THE "ORIGINAL PACKAGE" CASE.

A MAJORITY of the judges of the Supreme Court of the United States have recently decided, in Leisy *vs.* Hardin, the "Original Package Decision," Justices Gray, Harlan and Brewer dissenting, that a State cannot regulate nor prohibit the sale in its original package, however large or small, of liquor, or "other legitimate subjects of trade and commerce" brought in from another State. The decision is of grave importance as affecting State suppression or regulation of the liquor traffic, but the doctrine upon which it is based is of even graver importance as affecting the relation of the United States and the States under the Constitution. That doctrine is that a State cannot by any exercise of its police power directly or indirectly affect the operation of any power delegated by the people to the United States. That doctrine seems to be neither well founded in principle nor adequately supported by the previous decisions of the Court.

Every one will concede that, as the government of the United States has, in relation to the States and the citizens of the States, only those powers which are expressly or by necessary implication granted by the Constitution, the States may, in so far as they are not controlled by the expressed or implied restrictions contained in the Constitution, severally exercise all the powers of independent governments, including full powers of self-government, in all that affects only the interests of each State and its own citizens.

This power of self-government in matters of local concern is called the police power, and it cannot under any conditions nor to any extent be exercised by the federal government; for, as Story, J., has said, that power "has

never been conceded to the United States" (Prigg *vs.* Penna., 16 Pet., 539). Upon this principle it has been decided that the Civil Rights legislation of Congress, declaring it to be a criminal offence and a ground of civil liability to deny to any person within the jurisdiction of the United States the full and equal enjoyment of inns, transportation facilities, etc., is unconstitutional (Civil Rights Cases, 109 U. S., 3); that a murder committed on board a vessel of the navy of the United States while at anchor in waters within the jurisdiction of a State is recognizable only in the courts of that State (U. S. *vs.* Beavans, 3 Wheat., 366); and that an Act of Congress prohibiting the sale of illuminating fluid inflammable below a specified temperature cannot justify a conviction of one who has sold such fluid within a State (U. S. *vs.* DeWitt, 9 Wall., 41). If, therefore, any police power is to operate to any extent whatever within the territory of a State, it can only be exercised under State authority.

A careful survey of the broad field of federal decisions proves to demonstration that the rule deducible from the decided cases is that all powers granted by the Constitution to the government of the United States, which may in their exercise affect the internal concerns of a State, must be understood to have been granted with the implied qualification that their exercise should be subject to the police power of the State.

This principle applies to the operation of the federal government and its agencies within a State. While a State cannot tax the property (U. P. R. R. *vs.* McShane, 22 Wall., 444), nor the operation of the agencies of the government of of the United States, (McCulloch *vs.* Maryland, 4 Wheat., 419), yet, as Miller, J., said (National Bank *vs.* Commonwealth, 9 Wall., 362): "the agencies of the federal government are only exempted from State legislation so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government," and he concedes that the police laws of a

State operate on such agencies. Again, the Constitution empowers Congress to grant patents for inventions and discoveries, yet the patent does not exempt the patented article from the operation of the police power of the States (Patterson *vs.* Kentucky, 97 U. S., 501). Again, a license granted by the United States to a liquor dealer on payment of a license fee under its Internal Revenue laws does not exempt the dealer, or his business, or his goods from State regulation (McGuire *vs.* Commonwealth, 3 Wall., 387; Pervear *vs.* The Commonwealth, 5 *id.*, 475). Again, the Constitution of the United States forbids a State to impair the obligation of contracts, yet every contract is, from the moment it is made, subject to the operation of the police power of the States, notwithstanding the federal guaranty of its inviolability. Thus, a State may by legislation subsequently to their incorporation regulate the rates charged by its railways (C. B. & Q. R. R. *vs.* Iowa, 94 U. S., 155); a State may forbid the continued prosecution of their respective trades by corporations chartered to manufacture and sell liquor (Beer Co., *vs.* Massachusetts, 97 U. S., 25), or to conduct lotteries, (Stone *vs.* Mississippi, 100 *id.*, 814), or to render offal into fertilizers (Fertilizing Co. *vs.* Hyde Park, 97 U. S., 659); and a State may, in derogation of a prior grant of an exclusive privilege for the business of slaughtering cattle, authorize others to conduct the same business (Butchers' Union *vs.* Crescent City, 111 U. S., 746).

Again, the XIV Amendment created a citizenship of the United States as distinguished from a citizenship of a State, and in order to throw around that federal citizenship the protection of federal law, forbade any State to "deprive any person of life, liberty or property without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws," and yet those newly-created rights of citizenship are subject to the police laws of the States. (Slaughter House Cases, 16 Wall., 36). Therefore, a State may subsequently to the manufacture of a quantity of oleomargarine, pro-

hibit its sale (Powell *vs.* Penna., 127 U. S., 678), or even after the construction of a building exclusively adapted to the manufacture of beer forbid its use for that purpose, and thereby destroy its value (Kansas *vs.* Ziebold, 123 U.S., 623). Again, the Constitution confers upon the United States large powers of taxation, and yet those powers are not permitted to operate upon the property or agencies of a State (The Collector *vs.* Day, 11 Wall., 113).

The same principles have been in the main applied to the determination of the meaning and extent of the powers granted to the United States "to regulate commerce with foreign nations and among the several States." While the court has interpreted the term commerce to mean commercial intercourse in all its branches, including the exportation, transportation and importation of persons and merchandise by land or water, and while the court has construed the phrase "regulation of commerce" to include the prescription of rules for the conduct of commerce and also the obstruction of commerce by taxation of its subjects or instrumentalities, and while the court has consistently held the power to be essentially federal, and, as such, exclusive of State interference or control, the court has, nevertheless, until lately, steadily adhered to the doctrine that the exercise by the States of their police power over subjects or instrumentalities of interstate commerce is not to be deemed an usurpation of the federal power over such commerce.

In considering the cases, it must be borne in mind that the Constitution, in addition to granting to Congress the power "to regulate commerce with foreign nations and among the several States," declares "that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," etc., and the Supreme Court has decided that the express prohibition last quoted has reference, not to articles imported from one State to another, but only to articles imported from a for-

eign country into the United States (Woodruff *vs.* Parham, 8 Wall., 123; Brown *vs.* Houston, 114 U. S., 622), and, therefore, that while a State cannot tax imports or exports, it can tax articles brought in from another State, in their original and unbroken packages, for such articles, when delivered within the territory of the State and offered for sale, merge in the mass of property within the State. In the light of this constitutional distinction between foreign and interstate commerce, and in view of the cases just cited, the much relied on *dictum* of Chief Justice Marshall in Brown *vs.* Maryland, 12 Wheat., 447, that "Congress has a right not only to authorize importation, but also to authorize the importer to sell," has no relevancy to State taxation or control of articles of interstate commerce.

The Constitution declares that "no tax or duty shall be laid on articles exported from any State." If this prohibition applies to foreign and not to interstate commerce, and if Congress may tax exports from one State to another, nevertheless, the fact remains that Congress does not tax exports from one State to another, and the United States has not, if there be no federal taxation of interstate imports, that interest which it has in the case of foreign imports, that the right to import should include the right to sell. Of course, the only possible right which any foreigner, or any citizen of one State, can have as to the taxation or control of merchandise imported by him into another State is that there should be no discrimination against him.

In the light of these principles, rights of State taxation, more or less directly affecting interstate commerce, have been judicially recognized. Thus, it has been held that a State may tax vessels as the personal property of owners resident within its jurisdiction (T. Co. v. Wheeling, 99 U. S., 273); that a State may tax timber cut within its territory, owned by a non-resident, and intended for transportation to another State, but not actually started on its journey (Coe v. Errol, 116 U. S., 517); that a State may

tax coal, owned by a non-resident, imported from another State and afloat in a harbor of the taxing State in the vessel in which it has been imported (Brown *vs.* Houston, 114 U. S., 622); that a State may tax auction sales, including, without discrimination, sales of merchandise in original packages brought from another State (Woodruff *vs.* Parham, 8 Wall., 123); that a State may, without discrimination, tax sales of articles grown or manufactured in another State (Machine Co. *vs.* Gage, 100 U. S., 676); that a State may make the payment of a license fee a condition precedent to the transaction within the State of the business of making contracts for interstate transportation of freight; (Osborne *vs.* Mobile, 16 Wall., 479); and that a State may tax the capital stock of corporations created by it, and authorized to transport passengers or freight to and from the State (The Delaware R. R. Tax Case, 18 Wall, 206).

But the "Original Package" decision deals not with the power of State taxation, but with the exercise by a State of its police power, and there is an essential distinction between the nature and operation of these powers under the Constitution. On the one hand the police power, as has been shown, can be exercised only by the States. On the other hand, the taxing power may be exercised as to the same subject matter by both the United States and the States, and the federal supremacy requires that where federal and State taxation clash the latter must give way to the former. This is the doctrine upon which the judgment in Brown *vs.* Maryland is based, and that judgment expressly concedes that the police power "remains, and ought to remain, with the States" (12 Wheat., 443), for the obvious reason that if a State does not exercise the police power it must under the Constitution remain unexercised.

Upon this principle it has been held that a State may seize and forfeit a coasting vessel owned by a citizen of another State and licensed under the navigation laws of the United States, for violation of the laws of the State regulating the taking of oysters (McCready *vs.* Virginia,

94 U. S., 391); that a State may create a right of action for a tort causing death on navigable waters (Sherlock *vs.* Alling, 93, U. S., 99); that a State may create liens for supplies furnished to vessels in their home ports, or for materials furnished to ships in process of construction (Edwards *vs.* Elliott, 21 Wall., 532); that a State may artificially improve its harbors and navigable waters, until Congress adopts a system for their improvement (Mobile *vs.* Kimball, 102 U. S., 691); that a State may obstruct, partially by bridges or completely by dams, any navigable waters within its territory, until Congress requires the abatement of such obstructions (Willson *vs.* B. C. M.Co., 2 Pet., 245); that a State may build wharves on navigable waters and collect reasonable and non-discriminating dues for the use thereof (Packet Co. *vs.* Keokuk, 95 U. S., 80); that a State may, without discrimination between vessels of different States, regulate and control pilotage, so long as and to the extent that Congress does not legislate with regard to it (Cooley *vs.* The Board of Wardens, 12 How., 289); that a State may prohibit the entry of infected persons or goods into its territory, and provide for a quarantine examination of all imported persons or goods in order to determine whether or not they be infected, and to defray the expenses of such sanitary inspection, collect charges, provided that such charges be not in the form of duties on tonnage (Morgan *vs.* Louisiana, 118 U. S., 455); that a State may make port regulations prescribing where a vessel may lie in a harbor of the State, how long she may remain there, what lights she must show at night, etc. (The James Gray *vs.* The John Frazer, 21 How., 184); that a State may require, under a penalty, the master of every passenger-carrying vessel, on arriving at any port within the State, to report to the State authorities the name, place of birth, age, last legal settlement, and occupation of every passenger (N. Y. *vs.* Miln., 11 Pet., 102); that a State may prohibit or restrain the sale of liquor imported from a foreign country or another State, or manufactured within the

State and intended for exportation to another State (The License Cases, 5 How., 504); that a State may build and own railways and charge tolls for their use (B. & O. R. R. *vs.* Maryland, 21 Wall., 456); that a State may regulate interstate transportation by railways for the protection of the safety, health, and comfort of its citizens, as by forbidding the driving of an engine by an unlicensed engineer (Smith *vs.* Alabama, 124 U. S., 465), or by requiring the maintenance of fences and cattle guards (N. P. Ry. *vs.* Humes, 115 U. S., 512), or by prohibiting the use of steam power within the limits of a municipality (R. R. *vs.* Richmond, 96 U. S., 521); that a State may forbid a railway to charge in excess of its posted rate for transportation of freight from a point without to a point within the State (Ry. Co. *vs.* Fuller, 17 Wall., 560); that a State may regulate the rates charged by a private warehouse upon grain in course of interstate transportation (Munn *vs.* Illinois, 94 U. S., 113), or the rates charged by a railway for transportation within the State of freight in a course of interstate transportation (C., B., & Q. R. R. *vs.* Iowa, 94 U.S., 155); sed. cf. W. St. L. and P. Ry. *vs.* Illinois, 118 id. 557.

There are, however, two cases prior in time to "the Original Package Decision," which are not reconcilable with the authorities just cited, and which may be regarded as leading the way to that decision. In Robbins *vs.* Shelby County Taxing District (120 U. S., 489), it was held that a statute of Tennessee requiring without discrimination all drummers, etc., under a penalty to pay a license fee before making sales, would not justify a conviction of a drummer acting on behalf of a citizen of another State. In this case Waite, C. J., and Field and Gray, J. J., dissented on the ground that "if citizens of other States cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other States." In Bowman *vs.* C. & N. W. Ry. (125 U. S., 465), it was held that a State cannot forbid a common carrier to bring liquors into the State from another

State when the laws of the State forbid the sale of such liquors by unlicensed persons, and that such legislation does not relieve a common carrier from liability in damages for his refusal to carry liquor to an unlicensed consignee within the State. Waite, C. J., and Harlan and Gray, J. J., dissented from this judgment.

The Chief Justice concedes in the judgment of the court in the "Original Package Decision," that articles in such a condition as tend to spread disease are "not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction;" but the judgment decides that liquors are "legitimate subjects of trade and commerce, and, as such, importable and vendible in their original packages." The reply to this can best be made in the words of Harlan, J. (Bowman *vs.* C. & N. W. Ry., 125 U. S., 515), who has said: "It is admitted that a State may prevent the introduction within her limits of rags or other goods infected with disease, or of cattle or meat, or other provisions which, from their condition, are unfit for human use or consumption, because, it is said, such articles are not merchantable or legitimate subjects of trade and commerce. But suppose the people of a State believe, upon reasonable grounds, that the general use of intoxicating liquors is dangerous to the public peace, the public health, and the public morals, what authority has Congress or the judiciary to review their judgment upon that subject, and compel them to submit to a condition of things which they regard as destructive of their happiness and the peace and good order of society? If, consistently with the Constitution of the United States, a State can protect her sound cattle by prohibiting altogether the introduction within her limits of diseased cattle, she ought not to be deemed disloyal to that Constitution when she seeks by similar legislation to protect her people and their homes against the introduction of articles which are, in good faith and not unreasonably, regarded by her citizens as 'laden with in-

fection' more dangerous to the public than diseased cattle or than rags containing the germs of disease."

If it be said that as incidental to the regulation of interstate commerce there is vested in Congress a final power of legislating with regard to subjects of interstate commerce, and that, when Congress has legislated all conflicting State regulations must yield, it can also be said that even if that be so, Congress has not as yet legislated with regard to the interstate traffic in liquors.

So long as this last judgment of the court stands unreversed it will be possible for anyone to bring into a State any uninfected article or substance, however inherently dangerous, physically or morally, be its nature or use, and freely sell it, in defiance of State prohibition or regulation. High explosives, instruments of vice, and violent poisons will henceforth, if in original packages, receive the like constitutional protection with wine and beer.

Whenever, either in England or the United States, a judgment of any tribunal, however eminent, has been generally regarded by the members of the bar as a mistaken judgment, that judgment has, sooner or later, been either solemnly overruled, or so shaken by subsequent inconsistent decisions as to lose all value as a precedent. It is possible that the "Original Package" decision may meet that fate, but if it does not, nothing short of a constitutional amendment can change the law therein laid down. For the decision, being based upon the affirmation of a constitutional exemption of articles of interstate commerce from the exercise of the State's police power, no act of Congress can confer upon the States any power in the premises, for, as Taney, C. J., said (The License Cases, 5 How., 580): "It will hardly be contended that an act of Congress can alter the Constitution, and confer upon a State a power which the Constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the States to make any regulation upon the subject, Congress

could no more restore to the States the power of which they were thus deprived, than it could authorize them to coin money or make paper money a tender in the payment of debts, or to do any other act forbidden to them by the Constitution."

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